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**The Right to Freedom of Expression and  
Information under the European Human Rights  
System:  
Towards a more Transparent Democratic Society**

Dirk Voorhoof



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## Abstract

Article 10 of the European Convention of Human Rights has become a crucial instrument to stimulate and compel the national authorities of the 47 member states not only to abstain from interferences restricting media freedom and investigative journalism, but also to promote transparency, media pluralism and internet freedom. This paper explores some of the characteristics and developments of the European Court's case law regarding media, journalism, internet freedom, newsgathering, whistleblowing and access to information. The perspective of the analysis is that effectively guaranteeing the right to freedom of expression and information helps developing the quality of democracy, the protection of other human rights and ultimately contributes to realise a more sustainable, and hence a better, world to live in.

## Keywords

Participatory journalism, investigative journalism, media and internet freedom, access to information, whistleblowing, transparency

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## Abstract

Article 10 of the European Convention of Human Rights has become a crucial instrument to stimulate and compel the national authorities of the 47 member states not only to abstain from interferences restricting media freedom and investigative journalism, but also to promote transparency, media pluralism and internet freedom. This paper explores some of the characteristics and developments of the European Court's case law regarding media, journalism, internet freedom, newsgathering, whistleblowing and access to information. The perspective of the analysis is that effectively guaranteeing the right to freedom of expression and information helps developing the quality of democracy, the protection of other human rights and ultimately contributes to realise a more sustainable, and hence a better, world to live in.

## Keywords

Participation in public debate, investigative journalism, media and internet freedom, access to information, whistleblowing

## 1. Freedom of expression and the European Court of Human Rights

Article 10 of the European Convention reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation of others or for the protection of the rights of others, for the protection of the rights of others or for the protection of the rights of others.

Some of the basic material of this working paper is inspired by D. Yudofsky, 'Freedom of Expression under the European Human Rights System. From Sunday Times (No. 1) v. U.K. (1979) to Hachem Philippe Aouadi ("Le Paris") v. France (2009)', *Inter-American and European Human Rights Journal / Revista Interamericana y Europea de Derechos Humanos* (2009), p. 3-49. This working paper is a thorough update and it integrates references to case law of the European Court of Human Rights until August 2013. Furthermore it focuses on some recent developments in the Court's case law. A more extended version of this paper is scheduled for publication in P. Molnar (ed.), 1989, 2011 and Other Free Speech Narratives, CEU Press, Budapest, 2014.

For more information about the Council of Europe, see [www.coe.int](http://www.coe.int).

See the positive developments in these countries reflected in the press freedom indexes of *Reporters without Borders* and *Freedom House*.



## I. Introduction\*

The right to freedom of expression and information is guaranteed by Article 10 of the European Convention for the protection of Human Rights and Fundamental Freedoms (hereafter: the European Convention, or: the Convention) in all 47 member states of the Council of Europe, from Norway to Cyprus, from Iceland to Azerbaijan and from Portugal to Russia.<sup>1</sup> The way Article 10 of the Convention has been interpreted and applied by the European Court of Human Rights and has been promoted by the Council of Europe, has manifestly helped to upgrade and improve the level of freedom of expression and media freedom in countries that became member states of the European Convention after the fall of the Berlin Wall (9 November 1989), such as the Baltic states (Estonia, Lithuania and Latvia), the Czech Republic and Slovenia.<sup>2</sup> But also in countries that already had a longstanding constitutional and democratic tradition, the right to freedom of expression and information has been broadened, strengthened, updated and upgraded under the influence of Article 10 of the European Convention, especially regarding discussions on matters of public interest, in protecting newsgathering activities and journalistic sources, whistleblowing, access to public documents, media pluralism and internet freedom. In other Council of Europe member states with less solid democratic institutions or with growing pains towards democracy, press freedom and freedom of (political) expression is still a very problematic issue, such as in Turkey, Azerbaijan, Russia, Georgia, Armenia, Moldova, Serbia, Ukraine and Hungary. Article 10 of the Convention has become a crucial instrument however to motivate, to stimulate or even to compel the national authorities of the member states to abstain from interferences in freedom of speech and press freedom, to respect freedom of public debate, political expression and critical journalism to a higher degree and to promote media pluralism and internet freedom. This paper explores some of the characteristics and developments of the European Court's case law regarding media, journalism and freedom of expression and information, applying Article 10 of the Convention.

## II. Freedom of expression and the European Court of Human Rights

Article 10 of the European Convention reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

\* Some of the basic material of this working paper is inspired on D. Voorhoof, "Freedom of Expression under the European Human Rights System. From Sunday Times (n° 1) v. U.K. (1979) to Hachette Filipacchi Associés ("Ici Paris") v. France (2009), 1 Inter-American and European Human Rights Journal / Revista Interamericana y Europa de Derechos Humanos (2009), p. 3-49. This working paper is a thorough update and it integrates references to case law of the European Court of Human Rights until August 2013. Furthermore it focusses on some recent developments in the Court's case law. A more extended version of this paper is submitted for publication in P. Molnar (ed.), 1989, 2011 and Other Free Speech Narratives, CEU Press, Budapest, 2014.

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Article 10(1) stipulates the principle of the right to freedom of expression, while Article 10(2), by referring to “duties and responsibilities” that go together with the exercise of this freedom, opens the possibility for public authorities to interfere with this freedom by way of formalities, conditions, restrictions and even penalties. Yet, the main characteristic of Article 10(2) is precisely that, by imposing the so-called ‘triple test’, it substantially reduces the possibility of interference with the right to express, receive and impart information and ideas. Interferences by public authorities are only allowed under the strict conditions that any restriction or sanction must be ‘prescribed by law,’<sup>3</sup> must have a ‘legitimate aim’ and finally and most decisively, must be ‘necessary in a democratic society.’

The European Court’s case law over a period of 35 years<sup>4</sup> illustrates how the Court’s jurisprudence has manifestly helped to create an added value for the protection of freedom of expression, journalistic freedom, freedom of the media and public debate in the member states of the Convention.<sup>5</sup> Article 10 of the Convention as interpreted by the European Court has substantially contributed to the guarantee of a higher level of protection of freedom of expression in addition to the constitutional protection in the member states and complementary to other international treaties protecting freedom of expression and information.<sup>6</sup>

<sup>3</sup> In only a few cases the Court came to the conclusion that the condition “prescribed by law,” - which includes foreseeability, precision and publicity or accessibility and which implies a minimum degree of protection against arbitrariness-, was not fulfilled, such as in ECtHR 24 September 1992, Case No. 10533/83, *Herczegfalvy v. Austria*; ECtHR 23 September 1998, Case No. 24838/94, *Steel and Others v. UK*; ECtHR 25 November 1999, Case No. 25594/94, *Hashman and Harrup v. UK*; ECtHR 14 March 2002, Case No. 26229/95, *Gaweda v. Poland*; ECtHR 25 January 2005, Case Nos. 37096/97; 37101/97, *Karademirci and Others v. Turkey*; ECtHR 17 January 2006, Case No. 35083/97, *Goussev and Marenk v. Finland*; ECtHR 17 January 2006, Case No. 36404/97, *Soini and Others v. Finland*; ECtHR 18 July 2006, Case No. 75615/01, *Štefanec v. Czech Republic*; ECtHR 27 September 2007, Case No. 30160/04, *Dzhavadov v. Russia*; ECtHR 17 June 2008, Case No. 32283/04, *Meltex Ltd. and Mesrop Movsesyan v. Armenia*; ECtHR Grand Chamber 14 September 2010, Case No. 38224/03, *Sanoma Uitgevers BV v. the Netherlands*; ECtHR 25 October 2011, Case No. 27520/07, *Akçam v. Turkey*; ECtHR 29 March 2011, Case No. 50084/06, *RTBF v. Belgium*; ECtHR 18 December 2012, Case No. 3111/10, *Ahmet Yildirim v. Turkey* and ECtHR 25 June 2013, Case No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

<sup>4</sup> The case law analysed in this article focuses on the European Court’s jurisprudence since April 1979 (ECtHR 26 April 1979, Case No. 6538/74, *Sunday Times (n° 1) v. UK*, the first judgment in which the Court found a violation of Article 10) until July 2013 (ECtHR 23 July 2013, Case No. 33287/10, *Sampaio e Paiva de Melo v. Portugal*): all together nearly 1000 judgments related to Article 10 ECHR, freedom of expression, media and journalism.

<sup>5</sup> Other institutions and instruments of the European Convention of Human Rights and the Council of Europe play an important role in monitoring and enforcing freedom of expression as guaranteed under Article 10 ECHR, such as the Committee of Ministers’ supervision of the execution of the Court’s judgments (<[www.coe.int/t/dghl/monitoring/execution/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/default_en.asp)>) and the Commissioner of Human Rights who plays a prominent role in promoting and monitoring respect for human rights in the Council of Europe’s member states (<[www.coe.int/t/commissioner/default\\_en.asp](http://www.coe.int/t/commissioner/default_en.asp)>). By promulgating resolutions, declarations and recommendations, the Parliamentary Assembly, the Committee of Ministers’ and the Ministers responsible for Media and New Communication Services promote the awareness and develop guarantees for securing freedom of expression, e.g. in relation to court reporting, protection of journalistic sources, access to official documents, the right to reply, public service media, independent regulatory authorities in the media sector, media pluralism, coverage of election campaigns, the media in the context of the fight against terrorism, blasphemy, religious insult, hate speech and the application of freedom of expression principles on the internet and the new media environment. Aspects of freedom of expression are also reflected in and guaranteed by some Council of Europe Conventions, such as the Revised European Convention on Transfrontier Television (ECTTV, CETS nr. 32) and the European Convention on Access to Official Documents European (CETS nr. 205). The Council of Europe also promotes professional standards in the media and self-regulatory formats stimulating journalistic ethics or respecting ethical and basic democratic values on the Internet and in the new media, online media environment. See

<sup>6</sup> Exceptionally constitutional law or international treaties guarantee freedom of expression to a higher level: e.g. Article 19 and 25 of the Belgian Constitution prohibiting prior restraint (see also ECtHR 29 March 2011, Case No. 50084/06, *RTBF v. Belgium*) and Article 19 of the UN Covenant on Civil and Political Rights (ICCPR - 1966, in force since 1976), guaranteeing freedom of expression, including the freedom “to seek” information and ideas. Article 19 ICCPR also explicitly guarantees the freedom of expression “in the form of art”. See also General Comment No. 34, Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, UNHRC 2011,

An important aspect that has helped to develop and enforce this right is the strict scrutiny by the European Court of interferences by national authorities in freedom of expression on matters of public interest, and especially regarding the freedom of political expression and the role of the press as “public watchdog”. The recognition by the European Court of a horizontal effect<sup>7</sup> of Article 10 and of the positive obligations for member States to protect the right to freedom of expression<sup>8</sup> has further extended the scope of the right to freedom of expression in Europe. Another important factor that contributes to a substantial and sustainable impact of Article 10 is the high level of protection the Court has recognized vis à vis journalistic sources, whistleblowers, gathering of news and information, and more recently, the right of access to information held by public authorities and freedom of expression and information in online media and access to the internet. The Court has significantly upgraded freedom of expression of individuals, journalists, artists, academics, opinion leaders, NGOs and activists regarding their rights to receive, gather, express and impart information contributing to public debate in society. In a judgment of 25 June 2013 in the case of *Youth Initiative for Human Rights v. Serbia*, for instance, the European Court of Human Rights has reaffirmed the importance of NGOs acting in the public interest: “when a non-governmental organisation is involved in matters of public interest, such as the present applicant, it is exercising a role as a public watchdog of similar importance to that of the press”.<sup>9</sup> In *Ahmet Yildirim v. Turkey* the Court has explicitly recognised the right of individuals to access the internet. In its ruling against the wholesale blocking of online content (on Google Sites), it asserted that the internet has now become one of the principal means of exercising the right to freedom of expression and information.<sup>10</sup>

In recent years, restrictive trends in the approach of the Strasbourg Court have been identified, especially in a number of Grand Chamber judgments. The outcome and rationale of some judgments in which the Court has found no violation of the right to freedom of expression have raised some concerns regarding the (future) level of protection of press freedom in Europe compared to the ‘traditional’ high standards of the Strasbourg case law in this matter.<sup>11</sup> A similar concern is also reflected in dissenting opinions in annex to some recent judgments finding no violation of Article 10 of the Convention.<sup>12</sup> However, surveying the Court’s jurisprudence of the last years shows that the

(Contd.) <<http://www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf>>. Article 11 of the Charter of Fundamental Rights of the European Union guarantees “the freedom and pluralism of the media.”

<sup>7</sup> At several occasion the ECtHR has applied Article 10 ECHR in private legal relationships and it has repeatedly assessed interferences by private persons in the light of Article 10 § 2 ECHR: ECtHR 29 February 2000, Case No. 39293/98, *Fuentes Bobo v. Spain*; ECtHR 6 May 2003, Case No. 44306/98, *Appleby a.o. v. UK*; ECtHR Grand Chamber 30 June 2009, Case No. 32772/02, *Verein gegen Tierfabriken Schweiz (VGT) (n° 2) v. Switzerland*; ECtHR 16 December 2008, Case No. 23883/06, *Khursid Mustafa and Tarzibachi v. Sweden*; ECtHR 16 July 2009, Case No. 20436/02, *Wojtas-Kaletka v. Poland*; ECtHR 21 July 2011, Case No. 28274/08, *Heinisch v. Germany*; ECtHR Grand Chamber 12 September 2011, Case Nos. 28955/06, 28957/06, 28959/06, 28964/06, *Palomo Sánchez a.o. v. Spain*; ECtHR 6 October 2011, Case No. 32820/09, *Vellutini and Michel v. France*; ECtHR 10 May 2012, Case No. 25329/03, *Frasila and Ciocirlan v. Romania* and ECtHR 10 January 2013, Case No. 36769/08, *Ashby Donald a.o. v. France*.

<sup>8</sup> ECtHR 16 March 2000, Case No. 23144/99, *Özgür Gündem v. Turkey*; ECtHR Grand Chamber 7 June 2012, Case No. 38433/09, *Centro Europa 7 S.R.L. and Di Stefano v. Italy* and ECtHR 25 June 2013, Appl. No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

<sup>9</sup> ECtHR 25 June 2013, Appl. No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

<sup>10</sup> ECtHR 18 December 2012, Appl. No. 3111/10, *Ahmet Yildirim v. Turkey*. See also ECtHR 10 March 2009, Case Nos. 3002/03; 23676/03, *Times Newspapers Ltd (n° 1-2) v. UK*.

<sup>11</sup> See the proceedings and conclusions of the Seminar on the European Protection of Freedom of Expression: “Reflections on Some Recent Restrictive Trends”, Strasbourg 10 October 2008, <[www-ircm.u-strasbg.fr/seminaire\\_oct2008/index.htm](http://www-ircm.u-strasbg.fr/seminaire_oct2008/index.htm)>. See also R. Ó Fathaigh and D. Voorhoof, “The European Court of Human Rights, Media Freedom and Democracy” in: M. Price, S. Verhulst and L. Morgan (eds.), *Routledge Handbook of Media Law* (Routledge, New York 2013), p. 107-124.

<sup>12</sup> See e.g. ECtHR Grand Chamber 22 October 2007, Case Nos. 21279/02 and 36448/02, *Lindon, Otchakovsky-Laurens and July v. France*, in which the dissenting judges express the opinion that the Court’s judging no violation of Article 10 of the Convention is “a significant departure from the Court’s case-law in matters of criticism of politicians.” In *Stoll v.*



Court's case law related to Article 10 of the Convention is still maintaining high standards of freedom of expression, media pluralism and protection of journalists, hence obliging member states to secure within their jurisdictions a higher threshold of freedom of expression and information. The Grand Chamber judgments of 7 February 2012 in *Axel Springer AG v. Germany* and in *Von Hannover (n° 2) v. Germany*<sup>13</sup>, the recent findings of violations of Article 10 in several cases of protection of journalistic sources<sup>14</sup> and in a series of judgments in relation to critical reporting by media and investigative journalism<sup>15</sup> clearly illustrate the awareness of the European Court regarding the importance of freedom of expression and information in a democratic society. Especially the multiple references in the Court's recent case law to the danger of a "chilling effect"<sup>16</sup>, and its impact on the finding of unjustified interferences with media and journalists, help to secure a higher standard of freedom of expression and information through the interpretation and the application of Article 10 of the Convention. In *Kaperzyński v. Poland* (3 April 2012) the ECtHR emphasized that it "must exercise caution when the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in a discussion of matters of legitimate public concern (...). The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident (...). This effect, which works to the detriment of society as a whole, is likewise a

(Contd.)

Switzerland (ECtHR Grand Chamber 10 December 2007, Case No. 69698/01) the dissenting opinions consider the Court's judgment by finding no violation of Article 10 "a dangerous and unjustified departure from the Court's well established case-law concerning the nature and vital importance of freedom of expression in democratic societies." See also the dissenting opinions in ECtHR 16 July 2009, Case No. 15615/07, *Féret v. Belgium*; ECtHR 29 July 2008, Case No. 22824/04, *Flux (n° 6) v. Moldova*; ECtHR 17 February 2009, Case No. 38991/02, *Saygili and Falakaoğlu (n° 2) v. Turkey*; ECtHR 24 February 2009, Case No. 46967/07, *C.G.I.L. and Cofferati v. Italy*; ECtHR 4 June 2009, Case No. 21277/05, *Standard Verlags GmbH (n° 2) v. Austria*; ECtHR 16 July 2009, Case No. 10883/05, *Willem v. France*; ECtHR 31 May 2011, Case No. 3699/08, *Žugić v. Croatia*; ECtHR Grand Chamber 12 September 2011, Cases nos. 28955/06, 28957/06, 28959/06 and 28964/06, *Palomo Sánchez a.o. v. Spain*; ECtHR 26 June 2012, Case No. 12484/05, *Ciesielczyk v. Poland*; ECtHR 25 September 2012, Case No. 11828/08, *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*; ECtHR 9 October 2012, Case No. 29723/11, *Szima v. Hungary* and ECtHR 11 December 2012, Case No. 35745/05, *Nenkova-Lalova v. Bulgaria*.

<sup>13</sup> ECtHR Grand Chamber 7 February 2012, Case No. 39954/08, *Axel Springer AG v. Germany* and ECtHR 7 February 2012, Case Nos. 40660/08 and 60641/08, *Von Hannover (n° 2) v. Germany*.

<sup>14</sup> ECtHR 15 December 2009, Case No. 821/03, *Financial Times Ltd. a.o. v. UK*; ECtHR Grand Chamber 14 September 2010, Case No. 38224/03, *Sanoma Uitgevers BV v. Netherlands*; ECtHR 12 April 2012, Case No. 30002/08, *Martin a.o. v. France*; ECtHR 28 June 2012, Case Nos. 15054/07 and 15066/07, *Ressiot a.o. v. France*; ECtHR 22 November 2012, Case No. 39315/06, *Telegraaf Media Nederland Landelijke Media N.V. and Others v. the Netherlands*; ECtHR 18 April 2013, Case No. 26419/10, *Saint-Paul Luxembourg S.A. v. Luxembourg* and ECtHR 16 July 2013, Case No. 73469/10, *Nagla v. Latvia*.

<sup>15</sup> See ECtHR 12 April 2011, Case No. 4049/08, *Conceição Letria v. Portugal*; ECtHR 19 April 2011, Case No. 22385/03, *Kasabova v. Bulgaria*; ECtHR 19 April 2011, Case No. 3316/04, *Bozhkov v. Bulgaria*; ECtHR 31 May 2011, Case No. 5995/06, *Šabanović v. Montenegro and Serbia*; ECtHR 28 June 2011, Case No. 28439/08, *Pinto Coelho v. Portugal*; ECtHR 19 July 2011, Case No. 23954/10, *Uj v. Hungary*; ECtHR 26 July 2011, Case No. 41262/05, *Ringier Axel Springer Slovakia, a.s. v. Slovakia*; ECtHR 22 November 2011, Case No. 1723/10, *Mizzi v. Malta*; ECtHR 10 January 2012, Case No. 34702/07, *Standard Verlags GmbH (n° 3) v. Austria*; ECtHR 17 January 2012, Case No. 29576/09, *Lahtonen v. Finland*; ECtHR 21 February 2012, Case Nos. 32131/08 and 41617/08, *Tuşalp v. Turkey*; ECtHR 19 June 2012, Case No. 3490/03, *Tănăsioaica v. Romania*; ECtHR 10 July 2012, Case No. 46443/09, *Eiðsdóttir v. Iceland*; ECtHR 10 July 2012, Case No. 43380/10, *Hlynisdóttir v. Iceland*; ECtHR 18 September 2012, Case No. 39660/07, *Lewandowska-Malec v. Poland*; ECtHR 2 October 2012, Case No. 5126/05, *Yordanova and Toshev v. Bulgaria*; ECtHR, 16 October 2012, Case No. 17446/07, *Smolorz v. Poland*; ECtHR 23 October 2012, Case No. 19127/06, *Jucha and Žak v. Poland*; ECtHR 20 November 2012, Case Nos. 36827/06, 36828/06 et 36829/06, *Belek v. Turkey*; ECtHR 27 November 2012, Case Nos. 13471/05 and 38787/07, *Mengi v. Turkey*; ECtHR 22 January 2013, Case No. 33501/04, 38608/04, 35258/05 and 35618/05, *OOO Ipress a.o. v. Russia*; ECtHR 12 February 2013, Case No. 13824/06, *Bugan v. Romania* and ECtHR 23 July 2013, Case No. 33287/10, *Sampaio e Paiva de Melo v. Portugal*.

<sup>16</sup> E.g. when criminal law is applied to prosecute and sanction journalists while reporting on matters of public interest, or in cases of prior restraint or when severe sanctions are imposed on media of journalists. In defamation cases the Court does no longer accept prison sentences ECtHR (GC) 17 December 2004, Case No. 33348/93, *Cumpănă and Mazăre v. Romania*; ECtHR 18 December 2008, Case No. 35877/04, *Mahmudov and Agazade v. Azerbaijan* and ECtHR 6 July 2010, Case No. 37751/07, *Mariapori v. Finland*.

factor which goes to the proportionality, and thus the justification, of the sanctions imposed on media professionals".<sup>17</sup>

### III. The European Court of Human Rights: guaranteeing and delimiting the right to freedom of expression and information

Until a few decades ago, the limits and restrictions of freedom of expression were determined by national states, ultimately scrutinised by their own domestic judicial authorities, without any further external control. This situation, this 'paradigm' has significantly changed in Europe, due to the achievement of the European Convention of Human Rights and the enforcement machinery in which the European Court of Human Rights plays a crucial role.<sup>18</sup>

With the judgment in the case of *Sunday Times (n° 1) v. the United Kingdom*<sup>19</sup> it has become clear that Article 10 of the European Convention is effectively reducing the national sovereignty and the scope of national limitations restricting the right to freedom of expression and information. The judgment clarified that freedom of expression and information is not only to be respected by government and parliament, but also by the judicial authorities in the member states.<sup>20</sup> Most importantly the Court emphasized that freedom of expression "constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population." It also stated that this freedom "is subject to the exceptions set out in Article 10 § 2, which must, however, be interpreted narrowly." The Court held that there had been a violation of Article 10 by reason of an injunction restraining the publication in the *Sunday Times* of an article concerning a drug (thalidomide) and the litigation and damage claims linked to its use. The injunction, based on the common-law concept of contempt of court, was not found to be "necessary in a democratic society" in the eyes of the Court. With the judgment in the *Sunday Times* case the European Court established, albeit hesitantly at the time,<sup>21</sup> a higher level of protection for journalistic reporting on matters of public interest, also recognising "the right of the public to be properly informed" about matters of interest for society.

An abundant case law of the European Court of Human Rights has made clear that national law prohibiting, restricting or sanctioning expressions or information as forms of public communication may only be applied if the interference by the authorities is prescribed by law in a sufficiently precise way, is non-arbitrarily applied, is justified by a legitimate aim and most importantly is to be considered "necessary in a democratic society." It is the European Court itself that has determined and

<sup>17</sup> ECtHR 3 April 2012, Case No. 43206/07, *Kaperzyński v. Poland*.

<sup>18</sup> See also D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (Oxford, Oxford University Press 2009).

<sup>19</sup> ECtHR 26 April 1979, Case No. 6538/74, *Sunday Times (n° 1) v. UK*. A few years before, in its first judgment on freedom of expression (ECtHR 7 December 1976, Case No. 5493/72, *Handyside v. UK*), the Court emphasized the importance of freedom of expression in a democratic society, but *in casu* found no breach of Article 10 of the Convention, as the protection of minors was considered to justify the interference by public authorities against the "Little Red Schoolbook" and its publisher, Mr. Handyside.

<sup>20</sup> Regardless of how precisely the European Convention is internally applied or guaranteed in the member states (monistic or dualistic approach). In some countries the European Convention is given precedence over national law and the provisions of the Convention have direct effect; in other countries the Convention has been 'indirectly' incorporated into domestic law (e.g. in the UK by the *Human Rights Act* 1998 or in Germany by an approval in the Constitution, the *Zustimmungsgesetz* under Art. 59 of the German Constitution (*Grundgesetz*)). See also D.J. Harris, M. O'Boyle, E.P. Bates and C.M. Buckley, *Law of the European Convention on Human Rights* (Oxford, Oxford University Press 2009).

<sup>21</sup> Indeed, with only a small majority (11/9), the European Court came to the conclusion that there was a violation of Article 10 ECHR, overruling the House of Lords regarding its interpretation of a specific common-law application.



elaborated the characteristics of the vague and open notion of what can be considered necessary in a democratic society in terms of limiting freedom of expression and information. The Court has reiterated on many occasions that freedom of expression is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that "offend, shock or disturb". According to the Court's case law, an open, pluralistic and democratic society by itself is the most effective, if not the only, guarantor of respect for civil, political, cultural and social rights and freedoms. This means that Article 10 has to be interpreted from a perspective of a high level of protection of freedom of expression and information, even if expressed opinions or information are harmful to the State or some groups, enterprises, organisations or public figures. As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly. The need for any restrictions must be established convincingly, precisely because freedom of expression is considered essential for the functioning of a democratic society.<sup>22</sup>

If there are no sufficient and pertinent reasons for an interference in one's freedom of expression or media content or if an interference by the authorities is disproportionate to the legitimate aim pursued, the sanctioning of individuals, journalists, editors, publishers, or broadcasters on the basis of even legitimate, sufficiently precise, transparent and non-discriminatory national law restricting freedom of expression, is considered by the Strasbourg Court as violating Article 10 of the Convention.<sup>23</sup> The dynamic interpretation by the Court of what is to be considered "necessary in a democratic society" together with the limitation of the "margin of appreciation" by the member states has been crucial for the impact of Article 10 of the Convention on the protection of freedom of expression in Europe.

#### IV. From *Sunday Times* (n° 1) in 1979 to *Sampaio e Paiva de Melo* in 2013

With the *Sunday Times* (n° 1) case as a starting-point, followed years later by the judgments in *Barthold v. Germany*<sup>24</sup> and *Lingens v. Austria*,<sup>25</sup> many European countries have been found in violation with Article 10 after journalists, publishers, broadcasting organisations, individual citizens, civil servants, academics, politicians, artists, activists or non-governmental organisations applied to the European Court as a victim of an illegitimate, unjustifiable or disproportionate interference in their freedom of expression.<sup>26</sup> As a consequence of this case law by the Strasbourg Court and due to the binding character of the Convention, the member states are under a duty to modify and improve their standards of protection of freedom of expression in order to comply with their obligations under the European Convention (Article 1). This approach affects particularly the level of protection of

<sup>22</sup> See e.g. ECtHR Grand Chamber 17 December 2004, Case No. 49017/99, *Pedersen and Baadsgaard v. Denmark*; ECtHR 20 April 2006, Case No. 47579/99, *Raichinov v. Bulgaria*; ECtHR Grand Chamber 7 February 2012, Case No. 39954/08, *Axel Springer AG v. Germany* and ECtHR 19 June 2012, Case No. 3490/03, *Tănăsioaica v. Romania*. See also E. Dommering, "Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR): Freedom of Expression", in O. Castendyk, E. Dommering and A. Scheuer (eds.), *European Media Law* (Austin, Welters Kluwer 2008) p. 35-80 and E. Barendt, *Freedom of Speech* (Oxford, Oxford University Press 2005).

<sup>23</sup> See e.g. ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*; ECtHR 3 October 2000, Case No. 34000/96, *Du Roy and Malaurie v. France*; ECtHR 29 March 2001, Case No. 38432/97, *Thoma v. Luxembourg*; ECtHR 28 June 2001, Case No. 24699/94, *VGT Verein gegen Tierfabriken v. Switzerland*; ECtHR 25 June 2002, Case No. 51279/99, *Colombani and Others v. France*; ECtHR 29 March 2005, Case No. 72713/01, *Ukrainian Media Group v. Ukraine* and ECtHR 21 June 2012, Case No. 34124/06, *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*.

<sup>24</sup> ECtHR 25 March 1985, Case No. 8734/79, *Barthold v. Germany* (unjustified interference (prohibitory injunctions) issued against a veterinary surgeon restraining him from repeating in press interviews specified statements regarding the need for a night veterinary service and the running of his clinic offering such a service).

<sup>25</sup> ECtHR 8 July 1986, Case No. 9815/82, *Lingens v. Austria* (unjustified conviction of a journalist for defamation of and insulting value judgments about a politician).

<sup>26</sup> For an interesting set of analyses of the Court's case law, see J. Casadevall, E. Myjer, M. O'Boyle and A. Austin (eds.), *Freedom of Expression, Essays in honour of Nicolos Bratza* (Oisterwijk, Wolf Legal Publishers 2012).

journalistic reporting, political debate and discussion on matters of public interest, pushing back some traditional limitations of freedom of expression in many countries, limitations which can no longer be considered as justified in a democratic society. In some cases the European Court itself imposed the government of the defendant state to take concrete measures in order to have the applicant's freedom of expression and information immediately respected and restored, like in *Fattulayev v. Azerbaijan* (order of immediate release from prison of journalist convicted for defamation of public authorities) or in *Youth Initiative for Human Rights v. Serbia* (ordering that the Intelligence Agency of Serbia should provide the applicant NGO with the information requested).<sup>27</sup>

At the same time the European Court is also an important actor in preserving press freedom against new initiatives restraining that freedom. The Court's case law reveals opposition against introducing new limitations or imposing additional obligations that risk to neglect the important role of critical and independent media in a democratic society. A good illustration is the judgment of the European Court in the case *Mosley v. the United Kingdom* in 2011. The European Court of Human Rights decided that the right of privacy guaranteed by Article 8 of the European Convention on Human Rights does not require media to give prior notice of intended publications to those who feature in them. Having regard to the chilling effect to which a pre-notification requirement risked giving rise, to the doubts about its effectiveness and to the margin of appreciation afforded to the defendant state in this matter, the European Court was of the opinion that Article 8 did not require a legally binding pre-notification requirement.<sup>28</sup>

In another case, *Węgrzynowski and Smolczewski v. Poland*, the Court delivered an important judgment regarding a request for removal of an online newspaper article. The case concerned the complaint by two lawyers that a newspaper article damaging to their reputation - which the Polish courts, in previous libel proceedings, had found to be based on insufficient information and in breach of their rights - remained accessible to the public on the newspaper's website. The Court is of the opinion that the newspaper was not obliged to completely remove from its Internet archive the article at issue. It accepts that the State complied with its obligation to strike a balance between the rights guaranteed by Article 10 and, on the other hand, Article 8 of the Convention. The Court is of the opinion that the removal of the online article for the sake of the applicant's reputation in the circumstances of the present case would have been disproportionate under Article 10 of the Convention, as a rectification or an additional comment on the website would have been a sufficient and adequate remedy.<sup>29</sup>

The European Court of Human Rights has also reinforced the right of individuals to access the internet, in a judgment against wholesale blocking of online content. In its judgment, the Court asserted that the internet has now become one of the principal means of exercising the right to freedom of expression and information. The European Court is of the opinion that the decision taken and upheld by the Turkish authorities to block access to Google Sites amounted to a violation of Article 10 of the Convention, as the order, in the absence of a strict legal framework, was not prescribed by law. The judgment further makes clear that the Turkish courts should have had regard to the fact that such a measure would render large amounts of information inaccessible, thus directly affecting the rights of internet users and having a significant collateral effect. It is also observed that the Turkish law had conferred extensive powers to an administrative body in the implementation of a blocking order originally issued in relation to a specified website. As the effects of the measure have been arbitrary and the judicial review of the blocking of access to internet websites has been insufficient to prevent

<sup>27</sup> ECtHR 22 April 2000, Case No. 40984/07, *Fattulayev v. Azerbaijan* and ECtHR 25 June 2013, Appl. No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

<sup>28</sup> ECtHR 10 May 2011, Case No. 48009/08, *Mosley v. UK*.

<sup>29</sup> ECtHR 16 July 2013, Case No. 33846/07, *Węgrzynowski and Smolczewski v. Poland*, § 65-66.



abuses, the interference with the applicant's rights in the case of *Ahmet Yildirim v. Turkey* amounted to a violation of Article 10 of the Convention.<sup>30</sup>

The most recent judgment integrated in this analysis is the one in the case *Sampaio e Paiva de Melo v. Portugal*. A journalist who published a book in which he criticised the chairman of a world famous football club (M.P.C.), had been convicted for defamation. He was ordered to pay a fine and an award of damages because of some allegations against the chairman of the football club, calling him *inter alia* "a sworn enemy" of the national football team and referring to criminal procedures in which he was involved. The Court emphasised that the book was to be situated in a debate of public interest, it observed that the allegations and critical remarks published in the book were unrelated to the private life of M.P.C. and that the allegations and negative value-judgments expressed in the book had also a sufficient factual basis. The Court came to the conclusion that the conviction of the journalist was a breach of Article 10 of the Convention, taking into consideration the danger of a *chilling effect*.<sup>31</sup>

In between *Sunday Times (n° 1) v. the United Kingdom* in 1979 and *Sampaio e Paiva de Melo v. Portugal* in 2013, the European Court has determined and clarified the scope and the limits of the right to freedom of expression in Europe in about 1000 judgments. Especially in the last 15 years, since its reform in 1999, the European Court has frequently come to the conclusion that the right to freedom of expression has been violated by a member state.<sup>32</sup> In many other cases the Court agreed however with the defending State and declared the application inadmissible or, in a later stage, came to the conclusion that an interference was in accordance with the "triple test" of Article 10 of the Convention, finding no violation of freedom of expression.

The practical and effective impact of Article 10 still differs from one member state to another, which by itself is an indication of the somewhat weak enforcement instruments of the Convention and of the very different levels of development of democracy and respect for human rights in the Convention's member states. During the last ten years, Turkey, one of the 13 founding States of the Convention in 1950,<sup>33</sup> has been found over and over again to have acted in breach of the right to freedom of (political) expression.<sup>34</sup> The situation in terms of freedom of expression and information is also very problematic in some of the "new" member states, especially in Russia, Georgia, Armenia, Moldova, Azerbaijan and Ukraine, but also in Romania, Bulgaria, Serbia, Bosnia and Herzegovina, Albania, Croatia and Hungary. Disrespect for freedom of expression and information and press freedom in these countries goes hand in hand with violations of other fundamental human rights and freedoms. On the other hand, the countries with a high level of press freedom, as also reported in the

<sup>30</sup> ECtHR 18 December 2012, Case No. 3111/10, *Ahmet Yildirim v. Turkey*.

<sup>31</sup> ECtHR 23 July 2013, Case No. 33287/10, *Sampaio e Paiva de Melo v. Portugal*.

<sup>32</sup> In hundreds of cases the Court found a violation of Article 10. However, it is to be underlined that only a very small minority of the applications introduced in Strasbourg lead to a final judgment by the European Court, as most applications in an early stage are considered inadmissible for diverse reasons, e.g. for not fulfilling the condition of exhaustion of all (relevant) domestic remedies, for the lack of status as a 'victim,' for not applying within a period of six months or because the application is considered manifestly ill-founded (Art. 35 ECHR).

<sup>33</sup> The 13 European States that signed the European Convention of Human Rights and Fundamental Freedoms in 1950 were Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Turkey and the United Kingdom.

<sup>34</sup> In about 200 cases the Court has found a violation of freedom of expression by the Turkish authorities. In a few cases the Turkish government negotiated a friendly settlement, recognising that Turkish law and practice urgently needed to be brought into line with the Convention's requirements under Article 10 ECHR. The procedure for EU-membership of Turkey has proved to have only minor positive influences with regard the respect for human rights in general and specifically freedom of political expression in Turkey. Freedom of the press, freedom of artistic expression and political speech and demonstrations are still systematically interfered with by the Turkish authorities, violating structurally Articles 10 and 11 of the Convention. See e.g. ECtHR 14 September 2010, Case Nos. 2668/07, 6102/08, 30079/08, 7072/09 et 7124/09, *Dink v. Turkey* and ECtHR 21 February 2012, Case No. 32131/08 and 41617/08, *Tuşalp v. Turkey*.

international ratings of *Reporters without Borders (RSF)* or *Freedom House*,<sup>35</sup> are countries in which democracy, transparency, respect for human rights and the rule of law is strongly rooted, institutionalised and integrated in society.

## V. Article 10 and its contribution to a more transparent democracy

Already in its judgment in the *Sunday Times (n° 1)* in 1979 the Court has emphasised the "right of the public to be properly informed" about matters of public interest. It is remarkable to observe how the Court, has reiterated, emphasised and operationalised the importance of the right to receive information, including the right to seek and to gather information. The Court has also "created", within the perspective of Article 10, the right to have access to documents national authorities are inclined to keep away from the public eye.

The Court's case law reflects particular attention to the public interest involved in the *disclosure of information*, contributing to debate on matters of public interest: "In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence."<sup>36</sup> In such circumstances a journalist, a civil servant, an activist or a staff member of an NGO should not be prosecuted or sanctioned because of breach of confidentiality or the use of illegally obtained documents.<sup>37</sup> The Court has accepted that the interest in protecting the publication of information originating from a source which obtained and retransmitted the information unlawfully may in certain circumstances outweigh those of an individual or an entity, private or public, in maintaining the confidentiality of the information. A newspaper that has published illegally gathered emails between two public figures, directly related to a public discussion on a matter of serious public concern, can be shielded by Article 10 of the Convention against claims based on the right of privacy as protected under Article 8 of the Convention.<sup>38</sup>

In its Grand Chamber judgment in *Stoll v. Switzerland*, the Court confirmed that "press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result the press may no longer be able to play its vital role as "public watchdog" and the ability of the press to provide accurate and reliable information may be adversely affected."<sup>39</sup> In cases in which journalists reported about confidential information in a sensationalist way<sup>40</sup> or in which the revealed documents did not concretely or effectively contribute to public debate or only concerned information about the private

<sup>35</sup> See <www.rsf.org> and <www.freedomhouse.org>. See also L. Becker, R. Vlad and N. Nusser, "An Evaluation of Press Freedom Indicators", 1 *International Communication Gazette* (2007), p. 5-28.

<sup>36</sup> ECtHR Grand Chamber 12 February 2008, Case No. 14277/04, *Guja v. Moldova*.

<sup>37</sup> ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*; ECtHR 25 April 2006, Case No. No. 77551/01, *Dammann v. Switzerland*; ECtHR 7 June 2007, Case No. 1914/02, *Dupuis and Others v. France*; ECtHR 26 July 2007, Case No. 64209/01, *Peev v. Bulgaria* and ECtHR Grand Chamber 12 February 2008, Case No. 14277/04, *Guja v. Moldova*. See also ECtHR 19 December 2006, Case No. 62202/00, *Radio Twist v. Slovakia* and ECtHR 28 June 2011, Case No. 28439/08, *Pinto Coelho v. Portugal*.

<sup>38</sup> ECtHR (Decision) 16 June 2009, Case No. 38079/06, *Jonina Benediktsdóttir v. Iceland*. See also ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France* and ECtHR 19 December 2006, Case No. 62202/00, *Radio Twist v. Slovakia*.

<sup>39</sup> ECtHR Grand Chamber 10 December 2007, Case No. 69698/01, *Stoll v. Switzerland*. See also ECtHR Grand Chamber 27 March 1996, Case No. 17488/90, *Goodwin v. UK* and ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*.

<sup>40</sup> ECtHR Grand Chamber 10 December 2007, Case No. 69698/01, *Stoll v. Switzerland*.



life of the persons concerned,<sup>41</sup> the Court accepted (proportionate) interferences in their freedom of expression.

In the Grand Chamber judgment in *Guja v. Moldova*, the Court recognised the need of *protection of whistleblowers* by Article 10 of the Convention. The Court noted “that a civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation or publication corresponds to a strong public interest. The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.” Although disclosure should be made in the first place to the person’s superior or other competent authority or body, the Court accepted that when such a practice is clearly impractical, the information could, as a last resort, be disclosed to the public. The Court held that the dismissal of a civil servant for leaking two confidential letters from the public prosecutor’s office to the press was in breach of Article 10 of the Convention, also referring to the *serious chilling effect* of the applicant’s dismissal for other civil servants or employees, discouraging them from reporting any misconduct.<sup>42</sup> In *Bucur and Thoma v. Romania* the Court considered that the general interest in the disclosure of information revealing illegal activities within the Romanian Intelligence Services (RIS) was so important in a democratic society that it prevailed over the interest in maintaining public confidence in that institution. The Court was not convinced that a formal complaint to a Parliamentary Commission would have been an effective means of tackling the irregularities within RIS. It also observed that the information about the illegal telecommunication surveillance of journalists, politicians and business men that had been disclosed to the press affected the democratic foundations of the State. Hence it concerned very important issues for the political debate in a democratic society, in which public opinion had a legitimate interest. The conviction of *Bucur* for the disclosure of information on the illegal activities of RIS to the media was considered as a violation of Article 10 ECHR. In its judgment the Court also relied on Resolution 1729(2010) of the Parliamentary Assembly of the Council of Europe on protecting whistleblowers.<sup>43</sup>

Especially in cases where *information is published on alleged corruption, fraud or illegal activities* in which politicians, civil servants or public institutions are involved, journalists, publishers, media and NGOs can count on the highest standards of protection of freedom of expression. The Court has emphasised that “in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public has the right to be informed.”<sup>44</sup> The Court expressed the opinion that “the press is one of the means by which politicians and public opinion can verify that public money is spent according to the principles of accounting and not used to enrich certain individuals.”<sup>45</sup> Defamation laws and proceedings cannot be justified if their purpose or

<sup>41</sup> ECtHR 9 November 2006, Case No. 64772/01, *Leempoel and S.A. Ciné Revue v. Belgium* and ECtHR 3 February 2009, Case No. 30699/02, *Marin v. Romania*. See also ECtHR 14 March 2002, Case No. 46833/99, *De Diego Nafria v. Spain* and ECtHR Grand Chamber 17 December 2004, Case No. 33348/96, *Cumpănă and Mazăre v. Romania*.

<sup>42</sup> ECtHR Grand Chamber 12 February 2008, Case No. 14277/04, *Guja v. Moldova*. See also ECtHR 5 October 2006, Case No. 14881/03, *Zakharov v. Russia*; ECtHR 26 July 2007, Case No. 64209/01, *Peev v. Bulgaria*; ECtHR 13 November 2008, Case Nos. 64119/00; 76292/01, ECtHR 16 December 2008, Case No. 53025/99, *Frankowicz v. Poland*; *Kayasu v. Turkey*; ECtHR 13 January 2009, Case No. 39656/03, *Ayhan Erdoğan v. Turkey*; ECtHR 19 February 2009, Case No. 4063/04, *Marchenko v. Ukraine* and ECtHR 26 February 2009, Case No. 29492/05, *Kudeshkina v. Russia*; ECtHR 16 July 2009, Case No. 20436/02, *Wojtas-Kaletka v. Poland*; ECtHR 31 maart 2011, Case No. 6428/07, *Siryk v. Ukraine*; ECtHR 21 July 2011, Case No. 28274/08, *Heinisch v. Germany* and ECtHR 18 October 2011, Case No. 10247/08, *Sosinowska v. Poland*.

<sup>43</sup> ECtHR 8 January 2013, Case No. 40238/02, *Bucur and Toma v. Romania*.

<sup>44</sup> ECtHR 22 November 2007, Case No. 64752/01, *Voskuil v. Netherlands*.

<sup>45</sup> ECtHR 14 November 2008, Case No. 9605/03, *Krone Verlag GmbH & Co (n° 5) v. Austria*.

effect is to prevent legitimate criticism of public officials or the exposure of official wrongdoing or corruption. A right to sue in defamation for the reputation of officials could easily be abused and might prevent free and open debate on matters of public interest or scrutiny of the spending of public money.<sup>46</sup>

The European Court has made clear that in a democratic society, in addition to the press, *nongovernmental organisations (NGOs), campaign groups or organisations, with a message outside the mainstream* must be able to carry on their activities effectively and be able to rely on a high level of freedom of expression, as there is “a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.”<sup>47</sup> In a democratic society public authorities are to be exposed to *permanent scrutiny by citizens* and everyone has to be able to draw the public’s attention to situations that they consider unlawful.<sup>48</sup> The Court has also argued that freedom of expression is of particular importance for persons belonging to *minorities*.<sup>49</sup>

An interference by public authorities by means of prosecution or other judicial measures with regard to the *journalist’s research and investigative activities* calls for the most scrupulous examination from the perspective of Article 10 of the Convention.<sup>50</sup> It is based on this perspective that *journalistic sources* enjoy a very high level of protection in terms of Article 10 of the Convention. According to the Court, “protection of journalistic sources is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments including the Committee of Ministers Recommendation (...). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”<sup>51</sup> Searches and confiscations of journalistic material in order to reveal the identity of an informant can hardly be justified from this perspective. On several occasions, the European Court was

<sup>46</sup> ECtHR 9 June 2009, Case No. 17095/03, *Cihan Öztürk v. Turkey*.

<sup>47</sup> ECtHR 23 September 1998, Case No. 24838/94, *Steel and Others v. UK*. See also ECtHR 25 August 1998, Case No. 25181/94, *Hertel v. Switzerland*; ECtHR 28 June 2001, Case No. 24699/94, *VGT Verein gegen Tierfabriken v. Switzerland*; ECtHR 4 October 2007, Case No. 32772/02, *VGT Verein gegen Tierfabriken (n° 2) v. Switzerland*; ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzības Klubs v. Latvia* and ECtHR 7 November 2006, Case No. 12697/03, *Mamère v. France*. See also ECtHR 29 October 1992, Case No. 14234/88; 14235/88, *Open Door and Dublin Well Women v. Ireland*; ECtHR 25 November 1999, Case No. 25594/94, *Hashman and Harrup v. UK*; ECtHR 20 September 2007, Case No. 57103/00, *Çetin and Şakar v. Turkey* and ECtHR 3 February 2009, Case No. 31276/05, *Women on Waves v. Portugal*.

<sup>48</sup> ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzības Klubs v. Latvia*. See also ECtHR 12 June 2012, Case Nos. 26005/08 and 26160/08, *Tatár and Fáber v. Hungary*.

<sup>49</sup> ECtHR 17 February 2004, Case No. 44158/98, *Gorzeli v. Poland*.

<sup>50</sup> See ECtHR 24 February 1997, Case No. 19983/92, *De Haes and Gijssels v. Belgium*; ECtHR Grand Chamber 21 January 1999, Case No. 29183/95, *Fressoz and Roire v. France*; ECtHR Grand Chamber 20 May 1999, Case No. 21980/93, *Bladet Tromsø and Stensaas v. Norway*; ECtHR 3 October 2000, Case No. 34000/96, *Du Roy and Malaurie v. France*; ECtHR 29 March 2001, Case No. 38432/97, *Thoma v. Luxembourg*; ECtHR 25 June 2002, Case No. 51279/99, *Colombani and Others v. France*; ECtHR 27 May 2004, Case No. 57829/00, *Vides Aizsardzības Klubs v. Latvia*; ECtHR 19 December 2006, Case No. 62202/00, *Radio Twist v. Slovakia*; ECtHR 29 March 2005, Case No. 72713/01, *Ukrainian Media Group v. Ukraine* and ECtHR 7 June 2007, Case No. 1914/02, *Dupuis and Others v. France*.

<sup>51</sup> ECtHR Grand Chamber 27 March 1996, Case No. 17488/90, *Goodwin v. UK*. See also ECtHR (Decision) 8 December 2005, Case No. 40485/02, *Nordisk Film & TV A/S v. Denmark* and ECtHR 31 May 2007, Case No. 40116/02, *Šečić v. Croatia*.



of the opinion that searches of media offices, the home and place of work of journalists or reporters amounted to a violation of Article 10 of the Convention.<sup>52</sup>

An important development is the Court's recent shift towards approaching *access to public documents* from the perspective of Article 10 of the Convention. For a long time, the Court refused to apply Article 10 in cases of refusals of access to public documents.<sup>53</sup> However, in a 2007 judgment the Court expressed its opinion that "particularly strong reasons must be provided for any measure affecting this role of the press and limiting access to information which the public has the right to receive,"<sup>54</sup> implicitly recognising at least a right of access to information. In the spring of 2009 the Court delivered two important judgments in which it recognised the right of access to official documents. The Court made clear that when public bodies hold information that is needed for public debate, the refusal to provide documents in this matter to those who are requesting access is a violation of the right to freedom of expression and information as guaranteed under Article 10 of the Convention. In *TASZ v. Hungary* the Court's judgment mentioned the "censorial power of an information monopoly" when public bodies refuse to release information needed by the media or civil society organisations to perform their "watchdog" function. It also considered that the State had an obligation not to impede the flow of information sought by a journalist or an interested citizen. The Court referred to its consistent case law in which it has recognized that the public has a right to receive information of general interest and that the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs," in the public debate on matters of legitimate public concern, even when those measures merely make access to information more cumbersome. The Court emphasized once more that the function of the press, including the creation of forums for public debate, is not limited to the media or professional journalists. Indeed, in the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The Court recognized civil society's important contribution to the discussion of public affairs and qualified the applicant association, which is involved in human rights litigation, as a social "watchdog." In these circumstances the applicant's activities warranted Convention protection similar to that afforded to the press. Furthermore, given the applicant's intention to impart the requested information to the public, thereby contributing to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.<sup>55</sup>

<sup>52</sup> ECtHR 23 February 2003, Case No. 51772/99, *Roemen and Schmit v. Luxembourg*; ECtHR 15 July 2003, Case No. 33400/96, *Ernst and Others v. Belgium*; ECtHR 22 November 2007, Case No. 64752/01, *Voskuil v. Netherlands*; ECtHR 27 November 2007, Case No. 20477/05, *Tillack v. Belgium*; ECtHR 15 December 2009, Case No. 821/03, *Financial Times Ltd. a.o. v. UK*; ECtHR Grand Chamber 14 September 2010, Case No. 38224/03, *Sanoma Uitgevers BV v. Netherlands*; ECtHR 12 April 2012, Case No. 30002/08, *Martin a.o. v. France*; ECtHR 28 June 2012, Case Nos. 15054/07 and 15066/07, *Ressiot a.o. v. France*; ECtHR 22 November 2012, Case No. 39315/06, *Telegraaf Media Nederland Landelijke Media N.V. and Others v. Netherlands*; ECtHR 18 April 2013, Case No. 26419/10, *Saint-Paul Luxembourg S.A. v. Luxembourg* and ECtHR 16 July 2013, Case No. 73469/10, *Nagla v. Latvia*. See also Committee of Ministers of the Council of Europe, *Recommendation No. R (2000)7 on the right of journalists not to disclose their sources of information*, 8 March 2000, at <[www.coe.int/t/dghl/standardsetting/media/](http://www.coe.int/t/dghl/standardsetting/media/)>; Parliamentary Assembly of the Council of Europe, *Recommendation 1950(2011) on the Protection of Journalists' Sources*, 25 January 2011, at <<http://assembly.coe.int/mainf.asp?Link=/documents/adoptedtext/tal1/erec1950.htm>>; D. Banisar, *Silencing Sources. An International Survey of Protections and Threats to Journalists' Sources*, 2007, at <[www.privacyinternational.org](http://www.privacyinternational.org)> and D. Voorhoof, "The protection of journalistic sources under fire?" in D. Voorhoof (ed.), *European Media Law. Collection of Materials 2012-2013* (Gent, Knops Publishing 2012), p. 287-306 and at <<http://europe.ifj.org/assets/docs/147/154/9355293-0d86c9a.pdf>>.

<sup>53</sup> The Court got on a new track in ECtHR (Decision) 10 July 2006, Case No. 19101/03, *Sdruženi Jihočeské Matky v. Czech Republic*. See also W. Hins and D. Voorhoof, "Access to State-held information as a Fundamental Right under the European Convention on Human Rights", 3 *European Constitutional Law Review* (2007), p. 114-126.

<sup>54</sup> ECtHR 27 November 2007, Case No. 42864/05, *Timpul Info-Magazin and Anghel v. Moldova*.

<sup>55</sup> ECtHR 14 April 2009, Case No. 37374/05, *Társaság A Szabadságjogokért v. Hungary* and ECtHR 26 May 2009, Case No. 31475/05, *Kenedi v. Hungary*.

In *Kenedi v. Hungary* the European Court held unanimously that there had been a violation of the Convention, on account of the excessively long proceedings - over ten years - with which Mr. Kenedi sought to gain and enforce his access to documents concerning the Hungarian secret services. The Court also reiterated that "access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression." The Court noted that Mr. Kenedi had obtained a court judgment granting him access to the documents in question, following which the domestic courts had repeatedly found in his favour in the ensuing enforcement proceedings. The administrative authorities had persistently resisted their obligation to comply with the domestic judgment, thus hindering Mr. Kenedi's access to documents he needed to write his study. The Court concluded that the authorities had acted arbitrarily and in defiance of domestic law and it held, therefore, that the authorities had misused their powers by delaying Mr. Kenedi's exercise of his right to freedom of expression, in violation of Article 10.<sup>56</sup>

More recently the European Court has reiterated that "the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom" and that "obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as 'public watchdogs,' and their ability to provide accurate and reliable information may be adversely affected".<sup>57</sup> Referring to *TASZ v. Hungary* the European Court stated explicitly "that the notion of 'freedom to receive information' embraces a right of access to information". The Court is of the opinion that as the applicant NGO, *Youth Initiative for Human Rights*, was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression. The Court found that the restrictions imposed by the Serbian intelligence agency, resulting in a refusal to give access to public documents, did not meet the criterion as being prescribed by law, and therefore violated Article 10 of the Convention. The Court's recognition of the applicability of the right to freedom of expression and information in matters of access to official documents is undoubtedly an important new development which further expands the scope of application of Article 10 of the Convention.<sup>58</sup>

## VI. Conclusions and Challenges

The challenge for the future is to bring more European Convention member states in line with the European Court's case law. Still many national authorities in Europe do not meet the Article 10 standards of respect to freedom of expression of their citizens. Also freedom of newsgathering and independent and critical reporting by journalists and NGOs is still insufficiently protected or guaranteed at national level. Important steps still need to be taken in order to create access to information and transparency on matters of interest for society. Protecting and effectively guaranteeing these rights is a crucial step towards developing the quality of democracy, guaranteeing the respect for human rights and ultimately helping to realise a more sustainable, and hence a better, world to live in.

<sup>56</sup> ECtHR 26 May 2009, Case No. 31475/05, *Kenedi v. Hungary*. The Court came to the conclusion that in this case Article 13 (effective remedy) had also been violated since the Hungarian system did not provide for an effective way of remedying the violation of the freedom of expression in this situation. The Court found that the procedure available in Hungary at the time and designed to remedy the violation of Mr. Kenedi's Article 10 rights had been proven ineffective. There had, therefore, been a violation of Article 13 read in conjunction with Article 10 of the Convention.

<sup>57</sup> ECtHR 25 June 2013, Case No. 48135/06, *Youth Initiative for Human Rights v. Serbia*.

<sup>58</sup> See also the European Convention on Access to Official Documents, 18 June 2009, CETS nr. 205, <[www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=8&DF=24/09/2012&CL=ENG](http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=205&CM=8&DF=24/09/2012&CL=ENG)>.



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